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No. 96-1693

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANK X. HOPKINS, WARDEN, PETITIONER

v.

RANDOLPH K. REEVES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether *Beck* v. *Alabama*, 447 U.S. 625 (1980), entitles the defendant in a capital case to an instruction that permits the jury to find the defendant guilty of non-capital offenses, even where those non-capital offenses were not charged and, under applicable law, are not lesser-included offenses of the charged capital crime.

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INTEREST OF THE UNITED STATES

One of the questions presented in this case is whether *Beck* v. *Alabama*, 447 U.S. 625 (1980), entitles the defendant in a capital case to an instruction that permits the jury to find the defendant guilty of non-capital offenses, even where those non-capital offenses were not charged and, under applicable law, are not lesser-included offenses of the charged capital crime. The Court's resolution of that question could affect the jury instructions given in federal capital proceedings.[1]

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[1] The Court limited its grant of certiorari to the first, second, and fourth questions raised by petitioner. *Hopkins* v.

STATEMENT

1. In the early morning on March 29, 1980, in Lincoln, Nebraska, Janet L. Messner made an emergency 911 call, reporting that she had been stabbed and that she believed a friend of hers had been killed. When police responded to the residence from which the call was made, they found Ms. Messner lying on the floor, suffering from seven stab wounds to her chest. Ms. Messner told the police that she had been raped and stabbed by respondent, Randolph K. Reeves, who she said was her cousin. Ms. Messner subsequently died as a result of her wounds. *State* v. *Reeves*, 344 N.W.2d 433, 438-439 (Neb.), cert. denied, 469 U.S. 1028 (1984).

Elsewhere in the residence, the police found the partially clad body of Victoria L. Lamm. Ms. Lamm had been fatally stabbed in the chest. The bedroom in which Ms. Lamm's body was found reflected a violent struggle. A billfold containing respondent's identification was on the floor near Ms. Lamm's body, respondent's underwear was on the bed, and one of his socks was on the floor near the bed. The underwear contained spermatozoal secretions of respondent's type. Ms. Lamm's two-year-old daughter was also in the residence, but was unharmed. Less than an hour after Ms. Messner's emergency call, respondent was arrested some blocks away from the scene of the murders. On his body and clothes was blood of the same type as Ms. Messner's blood. Respondent, who had consumed alcohol and peyote, gave a statement in

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Reeves, 118 S. Ct. 30 (1997). In this brief, we address the first two questions, which we have consolidated into a single question. We do not address the fourth question, which involves the application of *Teague* v. *Lane*, 489 U.S. 288 (1989), to the rule announced by the court of appeals in this case.

which he said that he could not recall much about the murders, but did recall having raped and stabbed Ms. Messner. 344 N.W.2d at 438-439.

2. Respondent was charged with two counts of first-degree felony murder in the commission or attempted commission of a first-degree sexual assault. 344 N.W.2d at 438. He pleaded not guilty. At trial, his defense was that his consumption of alcohol and peyote had rendered him either insane or incapable of forming the intent required to commit a first-degree sexual assault. *Id.* at 440. Respondent requested that the jury be instructed on the offenses of second-degree murder and manslaughter. The trial court denied that request, because, under Nebraska law, neither offense is a lesser-included offense of felony murder. *Id.* at 442.[2] Respondent was found guilty of both felony-murder counts. *Id.* at 440. Pursuant to Nebraska law, a three-judge panel sentenced respondent, imposing a sentence of death on each count. *Ibid.*

3. Respondent appealed, challenging, *inter alia*, the trial court's refusal to instruct the jury on second-degree murder and manslaughter. 344 N.W.2d at 442. The Supreme Court of Nebraska rejected respondent's argument on that point, explaining that under Nebraska law neither offense is a lesser-included offense of felony murder. *Ibid.* (citing, *e.g.*, *State* v. *Hubbard*, 319 N.W.2d 116 (Neb. 1982)). The court rejected respondent's other contentions and affirmed his convictions and sentences. *Id.* at 449.

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[2] Nebraska's first-degree murder, second-degree murder, and manslaughter statutes are reproduced in the Appendix to this brief, *infra*, 1a-2a.

Respondent unsuccessfully sought relief in state collateral proceedings. *State* v. *Reeves*, 453 N.W.2d 359 (Neb. 1990). He filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment, and remanded the case for further consideration in light of *Clemons* v. *Mississippi*, 494 U.S. 738 (1990). *Reeves* v. *Nebraska*, 498 U.S. 964 (1990). On remand, the Supreme Court of Nebraska once again affirmed respondent's convictions and sentences. *State* v. *Reeves*, 476 N.W.2d 829 (1991), cert. denied, 506 U.S. 837 (1992).

4. Respondent then applied for a writ of habeas corpus in federal district court, pursuant to 28 U.S.C. 2254. One of respondent's claims was that the trial court had violated the requirements of *Beck* v. *Alabama*, 447 U.S. 625 (1980), by refusing to instruct the jury on second-degree murder and manslaughter, thereby submitting the case to the jury solely on the two capital counts. The district court rejected that claim, explaining that second-degree murder and manslaughter are not lesser-included offenses of felony murder under Nebraska law, and that *Beck* did not require that a jury be instructed on uncharged offenses that are not lesser-included offenses under state law. *Reeves* v. *Hopkins*, 871 F. Supp. 1182, 1205-1206 (D. Neb. 1994) (citing *Greenawalt* v. *Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), cert. denied, 506 U.S. 888 (1992)).

5. After further proceedings involving other claims,[3] the court of appeals eventually addressed respondent's *Beck* claim. It held that the trial court

[3] See *Reeves* v. *Hopkins*, 76 F.3d 1424 (8th Cir.), cert. denied, 117 S. Ct. 307 (1996), on remand, 928 F. Supp. 941 (D. Neb. 1996).

had violated the requirements of *Beck* by refusing to instruct the jury on second-degree murder and manslaughter. *Reeves* v. *Hopkins*, 102 F.3d 977, 981-987 (8th Cir. 1996) (reproduced in pertinent part at Pet. App. 1-16).

The court interpreted *Beck* as establishing a rule that, in a capital case, a State "may not prohibit an instruction on a noncapital charge that the evidence supports." Pet. App. 15. It further held that *Beck*, so understood, required the trial court in the present case to instruct the jury on second-degree murder and manslaughter. *Ibid.* The court accepted that, under Nebraska law, second-degree murder and manslaughter are not lesser-included offenses of felony murder. *Id.* at 8. It concluded, however, that *Beck* could not be distinguished on that basis, because *Beck* itself invalidated a state law that prohibited lesser-included-offense instructions in a capital case. *Id.* at 9. Thus, the court believed, state law alone cannot justify a trial court's failure to give an instruction under *Beck*. *Ibid.*

The court of appeals also found support for its holding in Nebraska's "rationale for prohibiting instructions for noncapital murder in felony murder cases." Pet. App. 12. As the court explained, Nebraska treats non-capital murder offenses as not included in felony murder because non-capital murder offenses require a culpable mental state with respect to the killing, while felony murder does not. *Ibid.*[4] According to the court of appeals, however, that rationale "disappears when the defendant is sentenced to death." *Id.* at 13.

[4] See, *e.g.*, *State* v. *Masters*, 524 N.W.2d 342, 348 (Neb. 1994); *State* v. *Hubbard*, 319 N.W.2d at 118; *State* v. *Montgomery*, 215 N.W.2d 881, 883 (Neb. 1974).

The court reached that conclusion because, in a capital prosecution based on felony murder, the State must in any event establish a level of culpability with respect to the killing in order to impose the death sentence. *Id.* at 12-15 (citing *Enmund* v. *Florida*, 458 U.S. 782 (1982); *Tison* v. *Arizona*, 481 U.S. 137 (1987)). The court therefore found itself "led to the conclusion that the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life." *Id.* at 13.

Because the court of appeals concluded that respondent's jury had not been instructed on a non-capital charge supported by the evidence, it granted a conditional writ of habeas corpus. Pet. App. 14-16. The court ordered that respondent's convictions would be vacated subject to a new trial unless the State modified respondent's death sentences to sentences of life imprisonment. *Id.* at 15-16.[5]

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[5] The court explained that modification of respondent's sentence would cure the *Beck* violation because, as the court had previously held, the Due Process Clause does not require that lesser-included-offense instructions be given in a non-capital case. Pet. App. 15-16 (citing *Pitts* v. *Lockhart*, 911 F.2d 109, 112 (8th Cir. 1990), cert. denied, 501 U.S. 1253 (1991)). See also, *e.g.*, *Bagby* v. *Sowders*, 894 F.2d 792, 795-797 (6th Cir.) (en banc) (refusal to instruct on lesser-included offenses in non-capital case does not violate Due Process Clause; citing cases from the Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits), cert. denied, 496 U.S. 929 (1990); but see *Vujosevic* v. *Rafferty*, 844 F.2d 1023, 1026 (3d Cir. 1988). Therefore, the court held, the failure to give the requested instructions undermined the validity only of the death sentences, not of respondent's underlying felony-murder convictions. Pet. App. 15-16. Respondent did not cross-petition to contest the adequacy of the remedy afforded to him, and that issue is thus not before the Court. See, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent, Michigan*, 510 U.S. 355, 364 (1994).

SUMMARY OF ARGUMENT

In *Beck* v. *Alabama*, 447 U.S. 625 (1980), this Court held that it violated the Constitution for Alabama to withdraw from the jury in a capital case the option, which otherwise would have existed under Alabama law, of finding the defendant guilty of a lesser-included offense that was supported by the evidence. Nowhere in *Beck* did the Court suggest that the Constitution requires trial judges to instruct juries in capital cases on non-capital offenses that are not charged and that, under applicable law, are not lesser-included offenses of the capital charge. The Court's subsequent cases establish that *Beck* stands for a much narrower proposition: the Constitution prohibits a State from erecting "artificial" barriers that restrict the jury to an all-or-nothing choice between capital conviction and acquittal. *California* v. *Ramos*, 463 U.S. 992, 1007 (1983). It does not require a trial court to give instructions on offenses that are not lesser-included offenses under generally applicable state law.

It has long been settled under Nebraska law that second-degree murder and manslaughter are not lesser-included offenses of felony murder. See, *e.g.*, *Morgan* v. *State*, 71 N.W. 788, 794 (Neb. 1897). That substantive principle of Nebraska law "does not offend federal constitutional standards," *Hopper* v. *Evans*, 456 U.S. 605, 612 (1982), and it justified the Nebraska trial court's refusal to instruct the jury in this case on second-degree murder and manslaughter.

An extension of *Beck* to require trial courts to instruct on non-capital offenses, even when those offenses are not included within the charged offense under applicable law, would have highly undesirable consequences. First, it would require the federal courts to develop a test to determine when such uncharged offenses are sufficiently related to the charged capital offense as to require submission to the jury. The Court has twice in recent years concluded that efforts to develop similar tests were unworkable. See *United States* v. *Dixon*, 509 U.S. 688, 711-712 (1993); *Schmuck* v. *United States*, 489 U.S. 705, 720-721 (1989). Second, the approach adopted by the court of appeals in this case would raise difficult issues relating to the power of capital defendants to waive their rights to adequate notice of the charges against them and, in the federal system, to indictment by a grand jury. Third, the approach adopted by the court of appeals would create the risk of unfair surprise, because it would apparently grant defendants the right to choose, during trial, to place entirely new offenses before the jury.

The court of appeals erred in believing that *Beck* justified overriding Nebraska law on lesser-included offenses because *Beck* itself had invalidated a state law. *Beck* held that a State may not single out a capital crime and refuse to give a lesser-included-offense instruction where the defendant would otherwise be entitled to such an instruction under state law. *Beck* does not justify the conclusion that, even where generally applicable state law would bar the giving of a lesser-included-offense instruction, the Constitution requires state courts to devise procedures to instruct on some non-lesser-included offense. Nor is the court of appeals' approach supported by

this Court's decisions in *Tison* v. *Arizona*, 481 U.S. 137 (1987), and *Enmund* v. *Florida*, 458 U.S. 782 (1982). Those cases establish that a death sentence may not be imposed in the absence of a finding that the defendant was a sufficiently culpable participant in the killing. They do not, however, require the jury to make that finding during the guilt phase of a criminal trial. *Cabana* v. *Bullock*, 474 U.S. 376, 384, 392 (1986). Thus, Nebraska remains free to assign to the sentencing body the task of making the finding required by *Tison* and *Enmund*, and can legitimately conclude that non-capital homicide offenses are not lesser-included offenses of felony murder because felony murder requires no showing of a mental state with respect to the taking of life.

ARGUMENT

THE OMISSION OF JURY INSTRUCTIONS ON NON-CAPITAL OFFENSES THAT WERE NOT CHARGED AND THAT, UNDER APPLICABLE LAW, ARE NOT LESSER-INCLUDED OFFENSES OF THE CAPITAL CRIMES AT ISSUE DOES NOT VIOLATE *BECK* v. *ALABAMA*

The court of appeals held that this Court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), requires that a jury in a capital case be given the option to find the defendant guilty of non-capital offenses even where those offenses were not charged and, under applicable law, are not lesser-included offenses of any charged offense. That holding is an unprecedented and unwarranted expansion of *Beck*.

A. *Beck* Is Limited To Lesser-Included-Offense Instructions That Are Otherwise Appropriate Under Applicable Law

1. In *Beck*, the defendant was charged with the capital crime of robbery-intentional killing. 447 U.S. at 627. His defense was that he had participated in the robbery, but had not intended the death of the victim. *Id.* at 629-630. In light of that defense, the defendant would have been entitled, under general principles of Alabama law, to a lesser-included-offense instruction on felony murder. *Id.* at 630. The trial court nevertheless refused to instruct the jury on felony murder, relying on an Alabama statute, "unique in American criminal law," that precluded trial judges from instructing the jury on lesser-included offenses in a capital case. *Id.* at 628 & n.3, 630, 635.

Because Alabama law required the jury to impose a death sentence if it found Beck guilty of robbery-intentional killing, the jury in Beck's case was confronted with an all-or-nothing choice: "either convicting [Beck] of the capital crime, in which case it [would be] required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime." 447 U.S. at 629. This Court held that Alabama's statute violated the Constitution. *Id.* at 627. The Court explained that, "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. That risk, the Court held, "cannot be tolerated in a case in which the defendant's

life is at stake." *Ibid.* Thus, the Court concluded, "Alabama is constitutionally prohibited from withdrawing th[e] option [of finding the defendant guilty on a lesser-included offense] from the jury in a capital case." *Id.* at 638.[6]

The Court's holding in *Beck* was narrow: it violated the Constitution for Alabama to withdraw from the jury in a capital case the option, which otherwise would have existed under Alabama law, of finding the defendant guilty of a lesser-included offense that was supported by the evidence. 447 U.S. at 627, 630 & n.5, 637. Nowhere in *Beck* did the Court suggest that the Constitution requires trial judges to instruct juries in capital cases on offenses that are not lesser-included offenses under applicable law. Moreover, this Court's subsequent cases establish that *Beck* cannot properly be read to impose such an obligation.

2. This Court has addressed *Beck* claims in three subsequent cases: *Hopper* v. *Evans*, 456 U.S. 605 (1982); *Spaziano* v. *Florida*, 468 U.S. 447, 454-457 (1984); and *Schad* v. *Arizona*, 501 U.S. 624, 645-648 (1991). In each case, the Court rejected efforts to extend the holding of *Beck*. Examination of the three

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[6] The defendant in *Beck* had relied on "both the Eighth Amendment as made applicable to the States by the Fourteenth Amendment and the Due Process Clause of the Fourteenth Amendment." 447 U.S. at 632. Although it did not specify the precise constitutional source for the right it identified, the Court in *Beck* did limit its holding to capital cases. See, *e.g.*, *id.* at 638 (Alabama's withdrawal of a lesser-included-offense instruction was "constitutionally prohibited * * * in a capital case"); *id.* at 638 n.14 (leaving open question "whether the Due Process Clause would require the giving of [lesser-included-offense] instructions in a noncapital case").

cases demonstrates that the trial court in this case acted constitutionally when it declined to instruct the jury on offenses that had not been charged and that are not lesser-included offenses of felony murder under Nebraska law.

a. In *Hopper*, the defendant was charged in Alabama state court with robbery-intentional killing. 456 U.S. at 607. He took the stand at trial, admitted that he had shot the victim in the back during the robbery, and asked the jury to return a guilty verdict. *Id.* at 607-608. He was convicted and sentenced to death. *Id.* at 608. The defendant subsequently sought habeas corpus relief in federal court, pursuant to 28 U.S.C. 2254, arguing *inter alia* that his conviction and sentence were invalid because he had been convicted under a statute that prohibited the jury from considering any lesser-included offenses in a capital case. *Id.* at 608-609. This Court rejected that claim.

The Court pointed out that its holding in *Beck* was expressly limited to cases in which the evidence would reasonably have supported a verdict on the lesser-included offense. 456 U.S. at 610. Where the evidence does not reasonably support a verdict on the lesser-included offense rather than the capital offense, the Court explained, giving the jury the option of arbitrarily convicting on the lesser-included offense makes capital proceedings more rather than less unreliable. *Id.* at 610-611. The Court then looked to Alabama law to determine whether the evidence in the case reasonably supported the giving of a lesser-included-offense instruction. *Id.* at 611-613.[7] The

[7] Under general principles of Alabama law, a lesser-included-offense instruction should be given if "there is any reasonable theory from the evidence which would support the position" that the defendant committed the lesser-included offense rather than the greater. 456 U.S. at 611-612 (quoting *Fulghum* v. *State*, 277 So. 2d 886, 890 (Ala. 1973)). The rule followed in the federal courts is that a lesser-included-offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Id.* at 612 (quoting *Keeble* v. *United States*, 412 U.S. 205, 208 (1973)). The Court remarked in *Hopper* that "[t]he Alabama rule clearly does not offend federal constitutional standards." *Ibid.*

defendant argued that the jury could reasonably have found him guilty of non-capital felony murder, which did not require proof of intent to kill. *Id.* at 612. The Court rejected that argument, because the evidence in the case—including the defendant's admission that he intentionally shot the victim in the back during a robbery—"affirmatively negated any claim that [the defendant] did not intend to kill the victim." *Id.* at 613. Thus, the Court concluded, "[a]n instruction on the offense of unintentional killing during this robbery was therefore not warranted" under Alabama law, and the failure to give such an instruction did not violate the Constitution. *Ibid.*[8]

[8] The court of appeals in the present case did not discuss the question whether the evidence would have permitted a reasonable jury to acquit respondent of felony murder but convict him of second-degree murder or manslaughter. As to second-degree murder, the answer to that question is plainly "no." Under Nebraska law, second-degree murder requires proof of an intent to kill. Neb. Rev. Stat. § 28-304(1) (1995). Respondent's defense was that he was so intoxicated that he either was insane or lacked the ability to form the intent to commit the predicate offense of first-degree sexual assault. No rational jury could rely on that defense to acquit respondent of felony-murder while at the same time finding respondent guilty of second-degree murder. Thus, under *Hopper*, the jury

b. The Court next considered a *Beck* claim in *Spaziano* v. *Florida*, 468 U.S. at 454-457. In *Spaziano*, the defendant was charged with first-degree murder. *Id.* at 450. At the close of the evidence, the trial court offered to instruct the jury on the non-capital lesser-included offenses of attempted first-degree murder, second-degree murder, third-degree murder, and manslaughter. *Ibid.* The trial court was

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should not have been instructed as to second-degree murder. See *State* v. *Huebner*, 513 N.W.2d 284, 292-293 (Neb. 1994) (jury should not be instructed as to lesser-included offense unless "the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense").

At the time of the offenses in this case, manslaughter required proof that the defendant caused the death either intentionally but without malice, as upon a sudden quarrel, or unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305(1) (1995); *State* v. *Pettit*, 445 N.W.2d 890, 905 (Neb. 1989) (manslaughter upon sudden quarrel requires proof of intent to kill); but cf. *State* v. *Jones*, 515 N.W.2d 654, 658-659 (Neb. 1994) (overruling *Pettit* and holding that manslaughter upon sudden quarrel does not require proof of intent to kill). The first type of manslaughter—killing that is intentional but without malice—could not properly have been submitted to the jury in this case, for the same reason that second-degree murder could not properly have been. An instruction as to the second type of manslaughter—unlawful-act manslaughter—would have been supported by the evidence only if a jury could reasonably have found that—although respondent was too intoxicated to form the intent to commit first-degree sexual assault, and thus should be acquitted of felony murder—he was not too intoxicated to form the intent necessary to commit some other unlawful act, and therefore should be convicted of "unlawful act" manslaughter because he unintentionally caused his victims' death while committing that unlawful act. Respondent did not identify any such unlawful act in the trial court, nor has he since.

willing to do so, however, only if the defendant would waive his statute-of-limitations defense to those charges. *Ibid.* The defendant refused to waive the defense, and the trial court accordingly refused to instruct on any lesser-included offenses. *Ibid.* The defendant was convicted of first-degree murder, and was sentenced to death. *Id.* at 451-452. After extensive state-court proceedings, this Court granted the defendant's petition for a writ of certiorari, to consider *inter alia* the defendant's claim that the trial court's refusal to instruct the jury as to any lesser-included offenses violated the requirements of *Beck*. *Id.* at 453-454.

The Court rejected the defendant's claim. It explained that its concern in *Beck* was "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." 468 U.S. at 455. "Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process. * * * *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice." *Id.* at 455-456. Thus, the Court concluded, "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Id.* at 455.[9]

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[9] The Court went on to indicate the view that a defendant would be entitled under *Beck* to choose either to waive a statute-of-limitations defense and insist on the giving of lesser-included-offense instructions or to assert the statute-of-

c. The Court most recently addressed the scope of *Beck* in *Schad* v. *Arizona*, 501 U.S. at 645-648. In *Schad*, the defendant was charged with a single count of first-degree murder. *Id.* at 628 (opinion of Souter, J.). Under Arizona law, first-degree murder is a single offense that includes both premeditated murder and felony murder. *Ibid.* The defendant's defense was that "the circumstantial evidence proved at most that [the defendant] was a thief, not a murderer." *Id.* at 629 (opinion of Souter, J.). The defendant asked that the jury be instructed on the lesser-included offense of theft, but the trial court refused. *Ibid.* The jury was instructed, however, on the non-capital lesser-included offense of second-degree murder. *Id.* at 646.[10] The defendant was convicted of first-degree murder, and was sentenced to death by the trial judge after a separate hearing. *Id.* at 629 (opinion of Souter, J.). The defendant challenged his conviction and sentence, arguing *inter alia* that the trial court had violated

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limitations defense and forfeit the right to such instructions. 468 U.S. at 456; see also *id.* at 467 (White, J., concurring in part and concurring in the judgment) (characterizing the Court's discussion of the point as dictum). Because the defendant in *Spaziano* had knowingly chosen to assert his statute-of-limitations defense, the Court concluded, "it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses." *Id.* at 457.

[10] As is explained below, see note 15, *infra*, second-degree murder is not a lesser-included offense of felony murder under Nebraska law. In *Schad*, however, the State was proceeding against the defendant in a single count charging both premeditated murder and felony murder. 501 U.S. at 628 (opinion of Souter, J.). Under Arizona law, second-degree murder apparently is treated as a lesser-included offense of premeditated murder but not felony murder. *Id.* at 660 (White, J., dissenting).

the requirements of *Beck* by refusing to instruct the jury as to the lesser-included offense of robbery. *Id.* at 645.[11] Specifically, the defendant argued that *Beck* required that the jury be instructed on *all* non-capital lesser-included offenses that were supported by the evidence. *Id.* at 646. This Court disagreed. *Id.* at 646-648.

The Court pointed out that, unlike the jury in *Beck*, the jury in *Schad* had not faced an all-or-nothing choice between capital murder and acquittal, because it had been instructed on the non-capital lesser-included offense of second-degree murder. 501 U.S. at 646-647. The Court rejected the argument that an instruction on robbery was also required in order to permit the jury to render a verdict consistent with one reasonable view of the evidence, *i.e.*, that, although the defendant had participated in the robbery, he had been completely uninvolved in the victim's murder. *Id.* at 647. As the Court explained, the reliability of the jury's first-degree murder conviction was not undermined by the absence of a lesser-included-offense instruction on robbery:

> To accept the [contrary] contention * * *, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or

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[11] Apparently, the defendant in *Schad* requested at trial a lesser-included-offense instruction only as to theft, while on appeal he contended that a robbery instruction should have been given. 501 U.S. at 629-630 (opinion of Souter, J.). In this Court, the defendant claimed that instructions should have been given as to both offenses. *Id.* at 645. Based on a concession by the State, this Court treated the request for a robbery instruction as having been properly preserved, and did not reach the question whether the request for a theft instruction had been properly preserved. *Id.* at 645 n.10.

> second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

Id. at 647-648. The Court further explained that it was not holding that the requirements of *Beck* would invariably be satisfied by the submission of any lesser-included offense, even if the lesser-included offense was not supported by the evidence. *Id.* at 648. Because it was undisputed, however, that the lesser-included offense instructed to the jury in *Schad* was supported by the evidence, the Court concluded that the requirements of *Beck* had been met. *Ibid.*[12]

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[12] The dissent in *Schad* took the view that *Beck* required that the jury be given a lesser-included-offense instruction as to each of the prosecution's theories of guilt. 501 U.S. at 661-662 (White, J., dissenting). Because the second-degree murder instruction was a lesser-included offense only as to the State's premeditated-murder theory, and because the jury was not given a lesser-included-offense instruction that applied to the State's felony-murder theory, the dissent would have reversed. *Ibid.* The dissent noted but rejected Arizona's claim that an instruction on robbery would not have been appropriate because robbery was not a lesser-included offense of felony murder under Arizona law. *Id.* at 660-662. The dissent acknowledged that "[i]t is true that the rule in *Beck* only applies if there is in fact a lesser included offense to that with which the defendant is charged." *Id.* at 661. It further acknowledged that "deference is due state legislatures and courts in defining crimes." *Ibid.* In the view of the dissent, however, the required deference had "constitutional limits," and did not extend to the case of felony murder-robbery and the predicate robbery, because "the underlying crime must, as a matter of law, be a lesser included offense of the greater." *Id.* at 661-662. The dissent supported that conclusion by pointing out that, under the test used in the federal courts for determining which offenses are "necessarily included" within the meaning of Federal Rule of Criminal Procedure 31(c), predicate felonies are lesser-included offenses of felony murder. *Id.* at 661 n.6 (citing *Schmuck* v. *United States*, 489 U.S. 705 (1989)).

3. The court of appeals in this case held that *Beck* requires that the jury in a capital case be instructed on at least one non-capital homicide offense supported by the evidence, even if the capital charge lacks any lesser-included homicide offenses under the law of the jurisdiction. Pet. App. 14-15.[13] That holding is erroneous.

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[13] The court of appeals appeared to require that, at least in this case, the State could not "bar an instruction on noncapital homicide." Pet. App. 13. The court of appeals did not discuss whether a non-capital offense other than homicide would satisfy *Beck*, and it suggested that, under Nebraska law, felony murder has no lesser-included offenses. *Id.* at 8. Although there is language to that effect in some Nebraska cases, see, *e.g.*, *State* v. *Price*, 562 N.W.2d 340, 346 (Neb. 1997), that language appears to refer to lesser-included homicide offenses, because it is clear under Nebraska law that the predicate felony is a lesser-included offense of felony murder. See *State* v. *Nissen*, 560 N.W.2d 157, 178-179 (Neb. 1997) (burglary is lesser-included offense of felony murder/burglary). Respondent in this case did not request that the jury be instructed as to the predicate felony of first-degree sexual assault, which is a lesser-included offense of felony murder under Nebraska law. Of course, an instruction as to first-degree sexual assault would not have been supported by the evidence in this case, because no rational jury could have acquitted respondent of felony murder but convicted him of sexual assault. See note 8, *supra*. On the other hand, the same appears to be true of the offenses

Beck and the cases applying it do not establish a *per se* rule that the jury in a capital case can never be confronted with an all-or-nothing choice between finding the defendant guilty of a capital charge or acquitting. Rather, they establish a much narrower proposition: a State may not erect "artificial" barriers that restrict the jury to an all-or-nothing choice between a capital offense and acquittal. *California* v. *Ramos*, 463 U.S. 992, 1007 (1983). Thus, the Court upheld the defendant's conviction in *Hopper*, even though the jury had confronted an all-or-nothing choice between conviction on a capital count and acquittal, because the State was entitled to enforce its rule that lesser-included-offense instructions should not be given unless the evidence reasonably supported the conclusion that the defendant was guilty of the lesser-included offense but not guilty of the greater offense. 456 U.S. at 610-612. Similarly, the Court upheld the defendant's conviction in *Spaziano*, even though the jury had confronted an all-or-nothing choice between conviction on a capital count and acquittal, because the State was entitled to insist that the defendant waive his statute-of-limitations defense if he wished to have the jury instructed on lesser-included offenses. 468 U.S. at 454-457.

Similar considerations dictate that respondent's convictions and sentences should be upheld. This, unlike *Beck*, is not a case in which the State artificially reduced the options available to juries in capital cases alone.[14] Rather, the State simply enforced its

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as to which respondent did request that the jury be instructed. See *ibid.*

[14] Nebraska's capital-sentencing procedures are quite different from the procedures followed in Alabama at the time *Beck* was decided. In *Beck*, the jury was told that, if it entered a guilty verdict, it would be required to impose a death sentence. 447 U.S. at 639 n.15. The Court in *Beck* concluded that such knowledge undermined the reliability of the jury's determination of guilt. *Id.* at 639-643. In Nebraska, by contrast, the jury plays no role in imposition of sentence. Neb. Rev. Stat. § 29-2520 (1995). One of the concerns that animated the decision in *Beck*, therefore, is not implicated in the present case.

long-standing rule of substantive law—applicable in capital and non-capital cases alike—that second-degree murder and manslaughter are not lesser-included offenses of felony murder. See, *e.g.*, *State* v. *Price*, 562 N.W.2d 340, 346 (Neb. 1997); *Thompson* v. *State*, 184 N.W. 68 (Neb. 1921) (reversing manslaughter conviction because defendant had been charged by information with felony murder, and manslaughter was not properly submitted to jury as lesser-included offense of felony murder); *Morgan* v. *State*, 71 N.W. 788, 794 (Neb. 1897).[15] As the federal courts had con-

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[15] To determine whether one offense is a lesser-included offense of another, the Nebraska courts generally apply an "elements" test essentially identical to that applied in the federal courts. See *State* v. *Williams*, 503 N.W.2d 561, 565 (Neb. 1993) (overruling 1990 decision that had adopted "cognate-evidence" test and returning to elements test that court had previously followed); *Schmuck* v. *United States*, 489 U.S. at 716. Under that test, the elements of the two offenses are compared, and, if proof of one offense necessarily establishes proof of the other, the latter offense is a lesser-included offense of the former. Applying the elements test, second-degree murder is clearly not a lesser-included offense of felony murder under Nebraska law, because a defendant who is guilty of felony murder will not necessarily have the intent to kill that is required to establish guilt of second-degree murder. The same is true as to manslaughter premised on an intentional killing without malice. See note 8, *supra*.

sistently held before the decision of the court of appeals in this case, it does not offend *Beck* for a trial court to refuse the request of a capital defendant that the jury be instructed on an uncharged offense which, under applicable law, is not a lesser-included offense of any charged offense.[16]

Under Nebraska law, manslaughter can also be committed by causing death "while in the commission of an unlawful act." Neb. Rev. Stat. § 28-305(1) (1995). Applying an elements test, that form of manslaughter could be viewed as a lesser-included offense of felony murder, because a defendant who committed felony murder necessarily would have caused death while in the commission of an unlawful act. The Nebraska courts do not appear to have specifically discussed "unlawful act" manslaughter when explaining the basis for the long-standing rule that manslaughter is not a lesser-included offense of felony murder. Whatever its basis, the rule that manslaughter is not a lesser-included offense of felony murder has been well settled in Nebraska for more than a century. There is no reason to conclude that Nebraska's approach to that question "offend[s] federal constitutional standards." *Hopper* v. *Evans*, 456 U.S. at 612. In any event, the evidence in this case would not have supported an instruction on "unlawful act" manslaughter. See note 8, *supra*.

[16] See, *e.g.*, *Greenawalt* v. *Stewart*, 105 F.3d 1268, 1276 (9th Cir.) (trial court's refusal to instruct jury on second-degree murder did not violate requirements of *Beck*, because, under Arizona law, second-degree murder was not lesser-included offense of felony murder), cert. denied, 117 S. Ct. 794 (1997); *Greenawalt* v. *Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991) (same), cert. denied, 506 U.S. 888 (1992); *Hill* v. *Kemp*, 833 F.2d 927, 929 (11th Cir. 1987) (under Georgia law, statutory rape is not lesser-included offense of forcible rape; therefore, even assuming that the requirements of *Beck* extend to non-capital cases, refusal to instruct as to statutory rape was not constitutional error); *Woratzeck* v. *Ricketts*, 820 F.2d 1450, 1457 (9th Cir. 1987) (because, under Arizona law, second-degree murder is not lesser-included offense of felony murder, trial

B. Any Requirement That The Jury Be Instructed On Offenses That Are Not Lesser-Included Offenses Under Applicable Law Would Be Unworkable

In addition to being unprecedented, the rule adopted by the court of appeals would give rise to serious practical problems. As has been noted, Nebraska courts, like their federal counterparts, generally apply an "elements" test to determine whether an uncharged offense may properly be submitted to the jury as a lesser-included offense. See note 15, *supra*. A rule that the Constitution requires state and federal courts to instruct juries on uncharged non-capital

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court's refusal to instruct as to second-degree murder did not violate requirements of *Beck*; "The constitutional protection prohibits the state from withdrawing [the lesser included offense] option from the jury in a capital case. As there was no option to withdraw, [the defendant] was not denied due process.") (internal quotation marks and citation omitted), cert. granted, vacated, and remanded on other grounds, 486 U.S. 1051 (1988); *Jones* v. *Thigpen*, 741 F.2d 805, 816 (5th Cir. 1984) ("*Beck* can be read only to require instruction in capital cases on lesser included offenses available under state law. Mississippi defines no lesser included offense that might have applied to this robbery-killing, and the trial court in this case was therefore not bound by *Beck* to deliver a lesser included offense instruction.") (citation omitted), cert. granted, vacated, and remanded on other grounds, 475 U.S. 1003 (1986); cf. *Hatch* v. *Oklahoma*, 58 F.3d 1447, 1454 (10th Cir. 1995) (affirming capital sentence even though trial court refused to instruct jury as to non-capital offense, because one requested offense was not supported by evidence, and other was not lesser-included offense under Oklahoma law; "We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set of facts under which a murder may be committed."), cert. denied, 116 S. Ct. 1881 (1996).

offenses that have elements different from those of the charged offense—lesser-*un*included offenses—would generate a daunting array of difficult issues.[17]

First, it is entirely unclear what relationship would have to exist between the charged capital offense and the other offense that the defendant wished to have the jury consider. For example, there was evidence in the present case suggesting that respondent committed a variety of lesser offenses in addition to second-degree murder and manslaughter: burglary, assault, indecent exposure, public intoxication, and possession of peyote. A similarly lengthy list could be drawn up in most capital cases. The court of appeals does not identify, and logic does not immediately suggest, the principles that should govern a court's determination as to which such offenses that are not lesser-included offenses under generally applicable state law a defendant could insist that the jury consider as an alternative to capital murder charges.[18]

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[17] The supposed obligation to instruct on lesser-unincluded offenses could arise in two contexts. First, a charged capital offense might lack any lesser-included offenses under applicable law. Second, even if the charged capital offense had lesser-included offenses, an instruction as to those lesser-included offenses might not be supported by the evidence, while an instruction as to one or more lesser-*un*included offenses might be. In the latter context, the rule adopted by the court of appeals would apparently require that the jury be instructed on at least one lesser-unincluded offense that was supported by the evidence.

[18] Defendants do not have a right under *Beck* to have the jury instructed as to all lesser-included—or, under the approach of the court of appeals in this case, lesser-unincluded—offenses. Rather, it suffices if one lesser-included offense supported by the evidence is submitted to the jury. *Schad*, 501 U.S. at 645-648. In addition, under *Hopper*, a defendant could not insist that the jury be instructed as to an offense if the evidence would not permit a reasonable jury to find the defendant guilty of that offense while at the same time acquitting on the capital murder count. 456 U.S. at 610-612. In the present case, the latter principle would rule out some of the listed offenses—*e.g.*, burglary (which requires proof of unlawful intent, see Neb. Rev. Stat. § 28-507 (1995)), see note 8, *supra*—but not others, *e.g.*, possession of peyote. It is wholly unclear how a trial court would decide which of the remaining lesser-unincluded offenses should be submitted to the jury.

In two recent cases, the Court has noted the difficulties created by rules—other than an elements test—for determining the requisite degree of relationship between offenses. See *United States* v. *Dixon*, 509 U.S. 688, 711-712 & n.16 (1993) (overruling earlier case applying "same conduct" test to determine whether subsequent criminal prosecution is barred by Double Jeopardy Clause; unlike "same elements" test, "same conduct" test produced confusion and was unworkable); *Schmuck* v. *United States*, 489 U.S. 705, 720-721 (1989) (rejecting "inherent relationship" test for determining when offense should be submitted to jury as lesser-included offense; "inherent relationship" test is "rife with the potential for confusion," while the "elements" test "promotes judicial economy by providing a clearer rule of decision"). One highly undesirable consequence of the rule adopted by the court of appeals in this case is that the federal courts would be required once again to attempt to develop a test, other than the elements test, for determining when an uncharged lesser-unincluded offense was sufficiently related to a charged capital offense as to make it constitutionally obligatory to submit the uncharged offense to the jury. Moreover,

federal courts addressing claims under 28 U.S.C. 2254 would be required to apply that test to a wide array of state statutes.

Second, submission of uncharged lesser-unincluded offenses would—barring waiver—violate the rights of the defendant. *Schmuck*, 489 U.S. at 717-718 (noting that submission of such offenses, without waiver, may violate defendant's right to indictment and right to notice).[19] Arguably, the defendant could waive those rights, *ibid.*; cf. *Spaziano*, 468 U.S. at 456, but the question then arises whether the defendant is free to waive those rights selectively, only as to the offense or offenses that he wishes for his tactical reasons to have submitted to the jury, or whether, conversely, the defendant could be required to waive his right to notice and indictment as to all appropriate lesser offenses. Either approach would present difficulties.[20]

Third, granting defendants the right to have uncharged and unincluded offenses submitted to the jury would raise concerns about unfair surprise. In Nebraska, as in the federal system, the contents of jury instructions are often not resolved until the trial is almost over. Neb. Rev. Stat. § 29-2016(5) (1995) (requests for jury instructions shall be made after evidence is concluded); Fed. R. Crim. P. 30 (requests for instructions are to be made at close of

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[19] In Nebraska, felony cases may be prosecuted either by indictment or by information. Neb. Rev. Stat. § 29-1601 (1995). In the federal system, felony cases must be prosecuted by indictment. U.S. Const. Amend. V; Fed. R. Crim. P. 7(a).

[20] On the one hand, it would hardly seem fair to permit a defendant to pick and choose among the array of lesser-unincluded offenses solely on the basis of his tactical interests. On the other hand, it would be no fairer to permit the prosecution to do the same.

evidence or at such earlier time during trial as court directs; court shall rule on requests before closing arguments). That does not create problems when the issue is the propriety of instructing the jury as to lesser-included offenses. Because such offenses are necessarily established by proof of the charged offense, the parties will have been focusing their respective efforts on proving or raising doubts as to the elements of the lesser-included offenses. See *Schmuck*, 489 U.S. at 718, 720.

The same will not be true as to lesser offenses with new elements. Such offenses introduce distinct issues into a trial, and neither party would have any way to anticipate that it needed to address those issues during the evidentiary phase of the proceedings. See *Schmuck*, 489 U.S. at 720 (rejecting "inherent relationship" test for identifying lesser-included offenses, because that test would not "permit[] both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly").

C. The Court Of Appeals' Reasoning Is Unsound

1. The court of appeals believed that it was justified in overriding Nebraska law on lesser-included offenses because *Beck* itself had invalidated a state law. Pet. App. 9, 11 & n.11. That reasoning is incorrect. *Beck* held that a State may not single out a capital crime and deny the giving of a lesser-included-offense instruction where the defendant would otherwise be entitled to such an instruction under general principles of state law. As the Court explained in *Beck*, Alabama gave defendants the right to a lesser-included-offense instruction in all non-capital cases, 447 U.S. at 636-637, and the State conceded that,

under its general rule, Beck "would have been entitled to instructions on first-degree (felony) murder and robbery," *id.* at 630 n.5. *Beck* does not justify the conclusion that, even where generally applicable state law would bar the giving of a lesser-included-offense instruction, the Constitution requires state courts to devise procedures to instruct on some non-lesser-included offense. And, for the reasons discussed above, any extension of *Beck* to impose such a requirement would encounter serious obstacles.

2. The court of appeals also found support for its holding in this Court's decisions in *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987) (death penalty could properly be imposed upon defendant convicted of felony murder, where defendant was major participant in predicate felony and acted with reckless indifference to human life), and *Enmund* v. *Florida*, 458 U.S. 782, 801 (1982) (death penalty could not be properly be imposed on defendant convicted of felony murder, where defendant was minor participant in predicate felony and lacked culpable mental state as to killing). Pet. App. 12-15. The court of appeals appeared to reason that, in order to comply with *Tison* and *Enmund*, the State will in any event have to make a showing about the mental state of the defendant with respect to the killings. Accordingly, the court concluded, the State cannot withhold from the jury instructions on other homicide offenses on the theory that those offenses inject a new issue into the case, *i.e.*, proof of a mental state relating to the killing. *Id.* at 13 ("To hold otherwise would mean that the State could avoid *Beck* by claiming that it need show no intent or reckless indifference with respect to the killing, yet could simultaneously avoid *Enmund* by adducing precisely such evidence.").

The court of appeals erred in its application of *Tison* and *Enmund*. This Court has made clear that *Tison* and *Enmund* do not affect the power of the States and the federal government to define the elements of capital offenses. *Cabana* v. *Bullock*, 474 U.S. 376, 385 (1986) ("[O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury."). To the contrary, although *Tison* and *Enmund* together define a substantive limitation on the circumstances in which a death sentence may be imposed, the limitation they define may properly be addressed at sentencing, or even thereafter. *Id.* at 392 (determination that defendant's conduct was sufficient to justify capital sentence may be made by "an appellate court, a trial judge, or a jury").

Tison and *Enmund* therefore do not undermine Nebraska's rationale for declining to treat second-degree murder and manslaughter as lesser-included offenses of felony murder. The fact that the State must ultimately meet the requirement imposed by *Tison* and *Enmund* does not support the conclusion that the jury in a capital case must be instructed on that requirement. Accordingly, *Tison* and *Enmund* are entirely consistent with the State's generally applicable rule that homicide charges such as second-degree murder are not lesser-included offenses of felony murder—in a capital prosecution or otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Neb. Rev. Stat. § 28-303. Murder in the first degree; penalty.

A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

Neb. Rev. Stat § 28-304. Murder in the second degree; penalty.

(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

(2) Murder in the second degree is a Class IB felony.

Neb. Rev. Stat § 28-305. Manslaughter; penalty.

(1) A person commits manslaughter if he kills another without malice, either upon a sudden

quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

(2) Manslaughter is a Class III felony.